IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-286

UNITED STATES OF AMERICA
ex rel. PAUL ROBINSON,

Petitioner,

-against-

WARDEN AUBURN CORRECTIONAL FACILITY,
State of New York, District Attorney,
Kings County, State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Appellees

On Appeal from the United States District Court,
Eastern District of New York

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Paul Robinson, prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered on June 10, 1976 which affirmed an order of the United States District Court for the Eastern District of New York which dismissed the petitioner's writ of habeas corpus.

OPINIONS BELOW

The order of the United States Court of Appeals dated June 10, 1976, is unreported, but is printed in the Appendix (13a). The opinion of the United States District Court for the Eastern District of New York dated March 10, 1976, is unreported but is printed in the Appendix (1a). The opinion of the New York State Court of Appeals is reported at 36 N.Y.2d 224, 367 N.Y.S. 2d 208 (1974) and is also printed in the Appendix (14a).

JURISDICTION

Following a second jury trial, the petitioner was found guilty of felony murder, attempted robbery in the first degree and attempted grand larceny in the third degree in violation of New York Penal Law sections 125.25(3), 160.15, 155.30.

On May 8, 1973, the petitioner was sentenced to a term of imprisonment of 15 years to life on the murder conviction and ten years on the attempted robbery conviction to run concurrently. The petitioner was given an unconditional discharge on the grand larceny conviction. Petitioner's conviction was affirmed without opinion by the New York Appellate Division, Second Department and by the New York Court of Appeals with an opinion. Petitioner filed a habeas corpus petition on November 11, 1975, in the United States District Court for the Eastern District of New York under 28 U.S.C. 2254. This petition was dismissed on March 12, 1976. On April 14, 1976 a certificate of probable cause was issued by the United States District Court. On June 10, 1976 the United States Court of Appeals for the Second Circuit affirmed the order of the District Court.

This petition is seasonably filed within 90 days of the United States Court of Appeals order. The jurisdiction of this Court is invoked under 28 U.S.C. 2254.

QUESTIONS PRESENTED

1. Whether the petitioner should be precluded from obtaining habeas corpus relief when his trial counsel failed to register an exception to a jury instruction which drastically impaired the fairness and accuracy of the factfinding procedures as construed by this Court in *Mullaney v. Wilbur* 421 U.S. 684 (1975) and *In Re Winship* 397 U.S. 358 (1970) when the trial court erroneously informed the jury that the petitioner asserted an affirmative defense in a New York Felony Murder prosecution.

2. Whether the affirmative defense provisions of the New York Felony Murder statute which places the burden upon a defendant to disprove the critical issues in dispute in order to reduce a murder conviction to the underlying felony violates the petitioner's rights to due process of law under the fourteenth amendment of the United States Constitution as construed by this Court in *Mullaney v. Wilbur* 421 U.S. 684 (1974) and *In Re Winship* 397 U.S. 358 (1970).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a captial, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV

". . . nor shall any state deprive any person, of life, liberty, or property, without due process of law . . ."

STATUTES INVOLVED

Penal Law, §125.25 Murder

"A person is guilty of murder when:

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; the Felony Murder statute provides in relevant part that except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any

other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder is a class A felony."

Penal Law §160.00 Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny. L. 1965, c. 1030, eff. Sept. 1, 1967.

Penal Law §160.15 Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or

2. Is armed with a deadly weapon; or

3. Uses or threatens the immediate use of a dangerous instrument.

Robbery in the first degree is a class B felony. L.1965, c. 1030; amended L. 1967, c. 791, §22, eff. Sept. 1, 1967.

Defenses; burden of proof

New York Penal Law Sect. 25

When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

BACKGROUND

On August 13, 1971, Germaine Philips was shot and killed while she was in Lincoln Terrace Park, located in Brooklyn, New York. At the time of the shooting, she was in the company of one Alberto Greene, her boyfriend. Mr. Greene indicated that the shooting occurred in the course of an attempted robbery of his person. He stated that three men came into the park where he and Germaine Philips were located, and one of the men took out a gun and asked him for his money, and the other brandished a knife, while the third was unarmed and didn't say anything. Greene refused to hand over his money and attempted to escape with his girlfriend. In the course of their attempted flight, Germaine Philips was shot and killed.

Shortly after this incident, Greene identified the individual with the gun as Rudolph Mills and identified the party who brandished the knife as Glen Darien. Both of these men were arrested and charged with the crime of murder and were subsequently found guilty.

On the date of the sentencing, Paul Robinson, 16 years of age, appeared outside the Courtroom and spoke to New York City Detective Iannuccilli, the arresting officer and the detective assigned to the case. Paul Robinson broke down and cried before Detective Iannuccilli, and told him that the men who were about to be sentenced for the murder of Germaine Philips were in fact innocent. He

indicated that he was in the park at the time of the shooting, and was in fact the party whom Greene had described as the third person who did not possess any weapons. He identified the two perpetrators of the crime as Gargo and George. He further stated that although he met Gargo and George in the park, he did not know that they were about to commit the crime of robbery against Alberto Greene. After giving this statement to Detective Ianuccilli, Paul Robinson was arrested and subsequently indicted for the murder of Germaine Philips, and other related charges.

Because of Robinson's statement, the District Attorney of Kings County, Eugene Gold, made an application to set aside the guilty verdict against Rudolph Mills and Glen Darien. This application was granted.

Robinson was thereafter found guilty after a second trial, of felony murder, attempted robbery and attempted grand larceny. In the first trial, the jury was unable to reach a verdict.[1]

FACTS

The facts proven at trial, were as follows. On the night of the crime, the murder victim, Germaine Philips, and her boyfriend, Alberto Greene, were in Lincoln Terrace Park. Petitioner and two other men, Gargo and George, entered the park and walked past Philips and Greene, then turned around and walked back toward the couple. Wielding a knife, one of the men (not petitioner) ordered Greene to empty his pockets. Greene said he had no money. The other man (not petitioner) held a gun to Greene's stomach. Greene and Philips attempted to escape, when the man

1. In the first trial, where the petitioner interposed the same defense, the same trial judge did not instruct the jury that the petitioner asserted an affirmative defense to the felony murder charge. The instruction on this defense is the error which deprived the petitioner of his due process rights.

with the gun fired and Philips was fatally wounded.[2]

Petitioner testified in his own defense at the trial. He stated that his walking in the park with Gargo and George was coincidental; that his presence in the park at the time and place of the attempted robbery was fortuitous and unpredictable; that he never discussed committing a robbery with Gargo and George; and that he did not know that Gargo and George intended to commit a robbery nor that they were armed.

2. The testimony at trial was ambiguous in respect to whether or not the petitioner partially blocked the escape path of Greene and Phillips.

REASONS FOR GRANTING THE WRIT

POINT I

BY ERRONEOUSLY INSTRUCTING THE JURY THAT THE PETITIONER ASSERTED AN AFFIRMATIVE DEFENSE IN A NEW YORK FELONY MURDER PROSECUTION, THE TRIAL COURT INFORMED THE JURY THAT THE PETITIONER WAS GUILTY OF THE UNDERLYING FELONY. THIS ERROR NEGATED THE PETITIONER'S PRESUMPTION OF INNOCENCE, REDUCED THE PROSECUTIONS BURDEN OF PROOF TO THE MURDER CHARGE AND IMPROPERLY COMPELLED THE PETITIONER TO PROVE HIS INNOCENCE. THIS BASIC DUE PROCESS VIOLATION SHOULD COMPEL THIS COURT TO REVIEW THIS CONVICTION EVEN THOUGH TRIAL COUNSEL FAILED TO REGISTER AN EXCEPTION TO THIS CHARGE.

This court, through the vehicle of habeas corpus, has traditionally reviewed state Court convictions resulting from violations of fundamental constitutional rights. This petitioner seeks redress from a state court conviction which was based upon a jury instruction which impermissably invaded the truth finding function of the jury. In so doing, the instruction negated the petitioner's presumption of innocence, unfairly shifted the burden of proof upon the petitioner to establish his innocence, and of necessity reduced the prosecution's burden of proof. These errors were committed when the trial court erroneously instructed

the jury that the petitioner pleaded an affirmative defense in a New York Felony Murder Prosecution and when the court further instructed the Jury that in order for the defendant to prevail he would have to prove this defense. Yet, when this instruction was given, trial counsel failed to register an exception to the charge. Notwithstanding the failure of trial counsel to except, this court should reaffirm the long salutary role of habeas corpus to prevent detentions contrary to fundamental law. This Court should now deal with the concern of Justice Brennan as voiced in his dissenting opinions in *Estelle v. Williams* 44 U.S.L.W. 4609 #74-676 (May 3, 1976), and *Francis v. Henderson* U.S.L.W. 4620 #74-5808 (May 3, 1976), 'that the remedy of habeas corpus will not be available to a petitioner when an accused does not object to a jury instruction that would otherwise deny him due process rights' as interpreted by this court in *Mullaney v. Wilbur,* 421 U.S. 684 (1970) and *In Re Winship,* 397 U.S. 358 (1970).

DUE PROCESS VIOLATION

The petitioner was charged with the crimes of felony murder, attempted robbery and attempted larceny. The petitioner testified in his own behalf and unequivocally denied his knowledge of and participation in these crimes. Yet in reviewing this testimony, the Trial Court completely negated the petitioners defense by informing the Jury that the petitioner had asserted an affirmative defense under the New York felony murder statute and in order for him to prevail he would have the burden of proving this defense.[3]

3. The Felony Murder Statute provides in relevant part that: except that in any prosecution under this subdivision, in which the defendant was not the only *participant* in the underlying crime, it is an affirmative defense that the defendant:

Since the petitioner did not assert or request this charge, the placement of the burden upon him to prove this defense was unreasonable and violative of due process of law.[4]

The constitutional impediment in such an instruction is that the affirmative defense statute informs the Jury that the petitioner was a *participant* in the underlying felony and that he attempts only to extricate himself from the murder charge by proving the affirmative defense. Therefore, this charge presupposes culpability and thus denigrates against the constitutional protection of the presumption of innocence.

The following is the language used by the Court in explaining the Felony Murder Doctrine and the affirmative defense provisions in the New York Murder Statute:

> "The People have the burden of proving the defendant guilty beyond a reasonable doubt *except to what we call an affirmative defense, which I will get to you later.* (A156) (Emphasis Added).
>
> "The People must prove that a homicide took place. And then comes the question of, what kind of a homicide was it, a murder, was it a manslaughter, *and the law provides,* gentlemen, *that a*

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

4. The New York Court of Appeals found that the Trial Court misstated a fact by informing the Jury that the petitioner had interposed an affirmative defense. The Court stated 'there was no basis in fact for that statement since the defendant had denied all knowledge and participation in the underlying crimes.'

person is guilty of murder when, acting alone or *with one more other person, he commits or attempts to commit robbery,* and in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant, if there by any, causes the death of a person other than one of the participants."

"In other words, it doesn't have to be an attempt to cause any death. If death results in the commission or the attempted commission of a robbery, then you have a murder." (A157)

"The People have the burden of proving the defendant guilty beyond a reasonable doubt '*except in certain instances*', and I read to you the section about a person being guilty of murder when, acting alone or with one other person he commits or attempts to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom, he or another participant, if there by any, causes the death of a person other than one of the participants." (A163)

"Then, the law goes on to read, except that in any prosecution under this subdivision *in which the defendant was not the only participant in the underlined crime, as an affirmative defense, the burden of proving this is on the defendant, that the defendant,* one, did not commit the homicidal act or in any way solicit, request, command or importune or aid the commission thereof, and that he was not armed with a deadly weapon or any other instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by a law abiding person. And that he had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance and further that he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in

death or serious injury." (Emphasis Added)

"I told you that the burden is on the People to prove the defendant guilty beyond a reasonable doubt, but *the defendant has the burden of proving all of those elements of his affirmative defense and the burden of proving an affirmative defense rests upon the defendant.* That means that it must be established by a fair preponderous of the credible evidence that the claim that the defendant makes is true." (A164)

* * *

"The law requires that, *in order for a defendant to prevail,* the evidence that supports his affirmative defense must appeal to you as more clearly representing what took place than opposed to his claim. *If it does not and the weight is so evenly balanced that you would be unable to say which evidence has the greatest weight on either side, then you must resolve the question in favor of the People, because it is only if the evidence favors the defendant's claim the evidence opposed to it, that you can find in favor of the affirmative defense for the defendant. You understand the fact that he has interposed this affirmative defense.*"

"Now the burden of proving an affirmative defense is, as I say, on him."

"The burden of proving that he participated in this crime, that he was acting in concert, is on the People. In other words, if he were there with the intent to commit a crime and participates in it with that intent, then he is guilty, if you are satisfied as to that beyond a reasonable doubt."

"On the other hand, if you are *satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know that one of his fellows was armed—and there was no proof that he, here, himself committed a homicide—no proof that he was armed but he must prove that he had no reasonable ground to believe that any other*

> participant was armed and that he had no reasonable ground to believe that any other participant intended to engage in this conduct. The burden of proving that is on him. That's if you are satisfied beyond a reasonable doubt that he was not a mere spectator, if you are satisfied beyond a reasonable doubt that he was not." (A-164-165) (Emphasis Added)

The New York Court of Appeals, concededly found that the Trial Court was in error by charging the affirmative defense since the petitioner had denied all knowledge of and participation in the underlying crimes. Yet, the Court found that it could not review this error because trial counsel failed to register an exception to the charge. The Court also noted that although the charge was ineptly phrased, it informed the jury that "if the defendant was found guilty of attempted robbery, the burden of proof of the affirmative defense of felony murder was upon him to establish." Also, the District Court in denying the application for habeas corpus relief found that neither the 'statute nor the Court's charge required the defendant to admit the commission of the underlying felony in order for him to assert his affirmative defense.'

A reading of both the statute itself and the charge given demonstrates that the Trial Court did not equivocate nor did it condition the finding of an affirmative defense by indicating that only if the petitioner was found guilty of attempted robbery would such a defense be available to the petitioner. It was unequivocally stated by the Trial Judge that the petitioner asserted an affirmative defense to felony murder, thus finding that the petitioner admitted his guilt to the underlying felony and only leaving the question open whether he could prove the elements of this defense to relieve him of the murder charge.

Also, it is respectfully submitted that contrary to the District Court's holding both the New York statute and the Court's charge require a defendant to admit his culpability to the underlying felony in order for him to assert this defense.

The affirmative defense embodied in the New York Felony Murder statute was enacted according to the drafters, to mitigate the harsh results of the rigid automatic envelopment of all participants in the underlying felony in the murder charge.[5] This statute provides *an accomplice of a felon* with an affirmative defense to the felony murder charge. *Peo. v. Bornholdt* 33 N.Y. 2d 75 (1973). It recognizes, in effect, the unjustness of imposing criminal liability, for consequences, as to which there is no culpable mental disposition on the part of the accomplice defendant. (*Peo. v. Bornholdt*, supra).[6]

This defense provides the opportunity for a non-killer to fight his way out of a murder charge by persuading a Jury, that he had nothing to do with the killing itself. Thus, this provision affords an opportunity of a *participant* in the underlying felony to establish that the homicide was not within the scope of the criminal agreement; but at the same time the defendant admits his guilt to the underlying felony. The party asserting this defense attempts only to mitigate the severity of his punishment.

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5. Proposed New York Penal Law Commission Stall Notes at 338 (McKinney Spec. Pamphlet 1964). R. Denzer and P. McQuillan Practice Commentary, McKinney's Cons. Laws of N.Y. Book 39, p. 37.

6. The basic premise underlying the Felony Murder Doctrine has been seriously questioned. A.L.I. Model Penal Code Tent. Draft, NO-9 (1959) #201.2 subd. (1) par. B. Comments at p. 33-39. For example, Robinson, whose conduct at the scene of the shooting was equivocal at best to prove the attempted robbery, now stands convicted of murder because of the outdated felony murder concept of transferred intent.

In fact in the District Court's opinion, the Court quotes the New York Penal Law commentaries which states that the statute gives 'a non-killer defendant of relatively *minor culpability* a chance of extricating himself from liability for murder, though not, of course, *from liability for the underlying felony.*'

Thus, when the Trial Court charged the Jury that the petitioner asserted the affirmative defense, the Jury in effect was instructed that the petitioner admitted he was a participant in the underlying felony. By such a charge, the petitioner is presumed guilty of the underlying felony and is required to come forward and prove his innocence of the Felony Murder charge. This requirement denied the petitioner a constitutional trial as enunciated by this Court in the opinions of *In Re Winship,* supra and its progeny *Cool v. United States* 409 U.S. 100 (1972) and *Mullaney v. Wilbur,* supra.

Indeed, there can be no greater denial of due process than to shift the burden upon the petitioner to prove a defense which he never in fact asserted. *DeJonge v. Oregon,* 299 U.S. 353, (1936). *Cole v. Arkansas,* 333 U.S. 196 (1946).

The Court also increased the likelihood of a conviction by the manner which it explained the Felony Murder statute. The Court on two occasions informed the Jury that in a felony murder prosecution when an affirmative defense is asserted, the people do not have the burden of proving guilt beyond reasonable doubt. (pages 11 and 12 of the petition). Also, the Court ineptly phrased the affirmative defense so that it could be construed by the Jury that the petitioner's burden to prove his defense was by a beyond a reasonable doubt standard instead of a preponderance of the evidence standard. (page 13 of the petition).

The whole theory behind the presumption of innocence rationale is to require the State to prove its case. An instruction to the Jury which effectively diminishes this presumption and facilitates convictions runs counter to our system of criminal justice. Here, the Court effectively diminishes this presumption by erroneously instructing the Jury that the petitioner had asserted an affirmative defense. Once this was done, the Jury had no choice but to convict the petitioner for the underlying felony. This also relieved the state of its obligation to prove all the essential elements of the crime as required in *In Re Winship,* supra and *Mullaney v. Wilbur,* supra.

Thus, the truthfinding function of the Jury was impermissibly invaded by this charge, which in turn reduced the State's burden of proving the petitioner's guilt beyond a reasonable doubt. These errors deprived the petitioner of his rights under the due process clause of the United States Constitution, which should mandate that this Honorable Court grant this petition for certiorari.

FAILURE OF THE TRIAL COUNSEL TO EXCEPT TO THE CHARGE

This Court, in its solemn role as the protector of personal freedoms has generally disfavored waivers of constitutional rights and has placed the burden on the State to establish such a waiver. *Johnson v. Zerbst.* 304 U.S. 458 (1938). *Fay v. Noia* 372 U.S. 391 (1963). *Illinois v. Allen* 397 U.S. 337 (1974). The narrow ground which this Court has set forth in habeas corpus petitions to justify a refusal to review a conviction stemming from a derogation of constitutional rights is confined to situations when the petitioner has knowingly, intelligently, and deliberately bypassed state procedures. *Fay v. Noia,* supra.

The Fay Court stated the rule:

> "If a habeas applicant after consultation with competent counsel or otherwise, understandingly, and knowingly forwent the privilege of seeking to vindicate his federal claims in the State Court, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the Federal Court on habeas to deny him all relief if the State Courts refused to entertain his federal claim on the merits though of course only after the Federal Court has satisfied itself by holding a hearing or by some other means of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief."

Applying this standard, it is apparent that this petitioner did not waive his right to protest his unconstitutional confinement due to the erroneous charge by the Trial Court.

The New York Court of Appeals was constrained not to review Robinson's appeal because counsel failed to register a timely exception to the charge. Associate Justice Wachtler, of that Court, voiced his dissent from the Court's opinion and reasoned that an exception was not necessary in order for that Court to review the conviction since the error committed by the Trial Judge deprived the Petitioner of fundamental constitutional rights. Justice Wachtler citing the *In Re Winship* opinion, supra, indicated that the error violated the due process clause of the United States Constitution and was fundamental error which under New York Law could be reviewed even thoug

there was no exception taken to the charge. Following the New York Court of Appeals opinion, that Court upon a motion for reargument amended the remittitur to read:

> "Upon the Appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the defendant was denied Due Process of Law when the Trial Court charged the Jury with respect to an alleged affirmative defense. This court held that there was no violation of defendant's constitutional rights."

Hence, the New York Court of Appeals in amending the remittitur left it open to the Federal Courts to decide whether there was a due process violation. A violation in the trial procedure of fundamental constitutional rights can be reviewed by the New York Court of Appeals even in the absence of an exception of the charge. *Peo. v. Patterson*, 39 N.Y. 2d 288 (1975).

The United States Court of Appeals for the Second Circuit in affirming the denial of habeas corpus relief for this petitioner, stated:

> "that petitioner's failure to object to the State Trial Judge's charge on the affirmative defense was apparently a deliberate strategic decision to enable petitioner to have the benefit of Jury consideration of the affirmative defense as well as the general denial."

This conclusion of the Circuit Court cannot be gleaned from this record. From the very inception of this case when Robinson voluntarily appeared in Court ultimately to free the two defendants wrongfully convicted of the murder of Germaine Phillips, he has steadfastly maintained his complete innocence and lack of participation in this crime. Similarly, defense counsel strategy throughout the trial was

to demonstrate that Robinson's actions at the scene of the crime was that of an individual who had no advance warning of the acts that were to be committed by Gargo and George. Certainly, there was no tactical advantage to be gained from the affirmative defense charge, since the defendants defense was his showing of his complete disassociation with Gargo and George. This charge could only take away from the believability of this defense. *Kibbe v. Henderson,* ——2d—— (2d Cir. 1976).

Here, the omission to except was due to the lack of appreciation of the issue by both the Trial Court and Trial Counsel. Assuredly, Counsel would not sanction a charge that takes away from his trial strategy and at the same time indicates the culpability of his client.

Similarly, the Petitioner, sixteen years of age at the time of the trial, did not consent to a charge that in effect declared him culpable of the very felony which he unequivocally denied committing.

This instruction imposed upon the Petitioner the unacceptable risk that the Jury was actually impeded from its truth finding function. This Court should adhere to the basic tenet of its jurisprudence, that constitutional rights affecting the fairness and accuracy of the fact finding process are not lost unless and until the State demonstrates "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* supra. *Barker v. Wingo* 407 U.S. 529-29, *Schenekcoth v. Bustamonte* 412 U.S. 718 235-46. Consistent with this philosophy, this Court should not foreclose a review of this conviction because of the failure of counsel to except to a constitutionally infirm charge to the Jury.

POINT II

THE NEW YORK FELONY MURDER STATUTE AND THE AFFIRMATIVE DEFENSE PROVISION EMBODIED IN THAT STATUTE REQUIRING THE DEFENDANT TO PROVE THE ELEMENTS OF THAT AFFIRMATIVE DEFENSE IN ORDER TO REDUCE A MURDER CONVICTION TO THE UNDERLYING FELONY IS ON ITS FACE AND AS APPLIED IN THIS CASE UNCONSTITUTIONAL AND IS DIRECT CONFLICT WITH THIS COURT'S DECISION IN MULLANEY V. WILBUR **AND** IN RE WINSHIP.

This Court in *Mullaney v. Wilbur,* supra, found that a Maine Statute requiring a defendant charged with murder to prove he acted "in the heat of passion" to reduce a murder charge to manslaughter did not comport with the requirements of the Due Process Clause. In that case, it was pointed out that the due process requirements as set forth in *In Re Winship* were not satisfied when the burden of proof was shifted to a defendant who was required to prove the critical facts in dispute. For such a requirement would increase the likelihood of an erroneous conviction.

Similarly, in this case, the statute itself and the manner in which the Court instructed the Jury on the affirmative defense placed an unconstitutional burden upon the defendant.[7]

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7. Prior to September 1, 1967, the burden of proof in New York on all defenses rested with the people. The advent of the present penal law brought with it the affirmative defenses (see Hechtman, Practice Commentaries McKinney's Cons. Laws of N.Y. Book 39, Penal Law #25. p. 62-63. In

The New York Felony Murder affirmative defense statute subjects a defendant to an undue hardship in two distinct ways. Initially, as mentioned in point one, the mere assertion of this defense requires the defendant to admit culpability to the underlying felony.[8] Secondly, the statute shifts the burden of proof upon the defendant to disprove an essential element of the crime for which he is charged.

For example, in order for Robinson to establish the affirmative defense, he was required to prove that he had no reasonable ground to believe that another participant intended to engage in conduct likely to result in death or serious physical injury. Since Robinson was charged with acting in concert with Gargo and George in the attempted robbery charge, (underlying felony), the state was also required to prove that Robinson intended to act in concert with Gargo and George to use physical force to commit the larceny against the victim.[9] Thus, on the most critical issue in the case, whether Robinson knew about and participated with Gargo and George in the underlying felony, the burden of proof rested squarely on the shoulders of the petitioner. It is a violation of due process to place the burden of persuasion upon the defendant to disprove the same issues which the prosecution must prove in its case, *Speiser v. Randall* 357 U.S. 513, 525-26 (1965). The placement of this burden upon the defendant runs counter to the basic policy of our criminal jurisprudence that it is

allocating burden of proof the penal law prescribes, in relevant part. "When a defense declared by statute to be an affirmative defense." is raised at a trial, the defendant has the burden of establishing such defense by a fair preponderance of the evidence. (Penal Law #25.00).

8. As mentioned in the Mullaney opinion this Court is concerned not only with the guilt or innocence in the abstract, but also with the degree of criminal culpability.

9. See page (11) of this petition.

up to the state to prove guilt not the defendant to prove innocence.

Under the *Mullaney* and *Winship* standards, an affirmative defense which embodies the same elements of the particular crime upon which the defendant is charged must be found to be unconstitutional.

Also under the unique circumstance of this case, the manner in which the defense was used by the trial court irreparably destroyed any possibility that the petitioner would be acquitted of the charges. Robinson did not assert the affirmative defense, but yet was obligated to prove the truth of his denials. Placing a burden on a defendant to prove a defense which he in fact never asserted may be sound public policy if the Courts' purpose is to facilitate convictions, but *Winship* and *Mullaney* teach us that it is constitutionally improper to facilitate convictions at the cost of imposing this type burden of proof upon a defendant.

Finally, by allocating to the defendant the burden of proof on crucial issues involved, the Jurors come to expect proof from the accused. This, of course, would detract from the defendant's fifth amendment privilege to remain silent and concomitantly expect proof from the people and not to expect the defendant to establish his innocence.

Hence, this Court should grant this petition for certiorari, inasmuch as the effect of the New York Felony Murder statute violates the procedural presumption of innocence which shields one charged with a crime and mandates a defendant to prove the same elements of the crime, which the people must prove.[10]

10. This Court is presently considering the constitutionality of section 125.25A of the New York Penal Law in the case of Gorden G. Patterson Jr. v. People of the State of New York (October 1975 Term).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronald M. Kleinberg
Attorney for Petitioner

MEMORANDUM OF DECISION AND ORDER

(SAME TITLE)

March 10, 1976

MISHLER, CH. J.

Petitioner was convicted of the crimes of felony murder, attempted robbery in the first degree and attempted grand larceny. N.Y. Penal L. §§125.25(3), 110.00/160.15 and 110.00/155.30 (McKinney 1975), in Supreme Court, Kings County, in 1973. Petitioner was sentenced to concurrent terms of fifteen (15) years to life on the murder charge, ten (10) years on the attempted robbery charge and a conditional discharge on the attempted grand larceny charge. Petitioner now seeks a writ of habeas corpus from this court, claiming that the trial court's charge violated the defendant's fifth and fourteenth amendment right to due process by requiring the defendant to prove his innocence on the felony murder charge. The petition claims that: (1) an erroneous notion was conveyed to the jury when the court instructed them that the defendant had interposed an affirmative defense and that in so doing, the petitioner had admitted his guilt to the underlying felony; and (2) by "in essence . . . declaring that the People had proved the charge of murder, which shifted the burden upon the defendant to come forth and testify to prove his innocence," the court relieved the state of its obligation to prove all the essential elements of the crime beyond a reasonable doubt as required in *In re Winship*, 379 U.S. 598, 90 S.Ct. 1068 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975). For the reasons stated below, the court denies the writ and dismisses the petition.

I. PETITIONER'S STATE TRIAL AND APPEAL

The facts of petitioner's criminal activity which were proven at trial, interpreted in the light most favorable to respondents,[1] were as follows.[2] On the night of the crime, the murder victim, Germaine Phillips, and her boyfriend, Alberto Greene, were in Lincoln Terrace Park. Petitioner and two other men, Gargo and George, entered the park and walked past Phillips and Greene, then turned around and surrounded the couple. Wielding a knife, one of the men (not petitioner) ordered Greene to empty his pockets. Greene said he had no money. The other man (not petitioner) held a gun to Greene's stomach. When Greene attempted to escape from the robbers he was partially blocked by petitioner. The man with the gun fired and Phillips was fatally wounded.

Petitioner testified in his own defense at the trial. He stated that his walking in the park with Gargo and George was coincidental; that his presence in the park at the time and place they attempted the robbery was fortuitous and unpredictable; that he never discussed committing a robbery with Gargo and George; and that he did not know that Gargo and George intended to commit a robbery nor that they were armed.

II. REVIEWABILITY OF PETITIONER'S CLAIMS

Petitioner appealed his conviction to the Appellate Division of the Supreme Court, Second Judicial Department, 43 A.D.2d 908, 351 N.Y.S.2d 647 (2d Dept. 1974) (aff'd. without opinion), and to the New York Court of Appeals, 36 N.Y.2d 224, 367 N.Y.S.2d 208 (1974). Petitioner's main contention on appeal was that the judge's charge mistakenly informed the jury that petitioner had

asserted the affirmative defense to felony murder, and that the effect of the charge was to mislead the jury on the prosecutor's burden of proving petitioner's guilt.[3]

Petitioner's conviction was reviewed by New York's highest appellate court, and he has therefore exhausted his state remedies and is properly before this court, 28 U.S.C. §2254.

III. DISCUSSION

"A jury charge in a state trial is normally a matter of state law and is not reviewable on federal habeas corpus absent a showing that the alleged errors were so serious as to deprive defendant of a federal constitutional right. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Schaefer v. Leone*, 443 F.2d 182 (2d Cir.), *cert. denied*, 404 U.S. 939, 92 S.Ct. 277, 30 L.Ed.2d 251 (1971) . . . ." *United States ex rel. Smith v. Montayne*, 505 F.2d 1355, 1359 (2d Cir. 1974). The judge's charge here, though at times confusing, did not constitute a transgression of fundamental constitutional guarantees. *United States ex. rel. Colon v. Follette*, 366 F.2d 775 (2d Cir. 1966); *Grundler v. North Carolina*, 382 F.2d 798, 802 (4th Cir. 1960). The opportunity for clarification was offered defendant[4] after the charge was given and before the jury started to deliberate.[5] The claim of error was waived. *United States ex rel. Satz v. Mancusi*, 414 F.2d 90 (2d Cir. 1969); *United States v. Nasta*, 398 F.2d 283, 285 (2d Cir. 1968).

The New York felony murder statute, N.Y. Penal Law §125.25(3) (McKinney 1975),[6] gives " . . . a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder, though not, of

course, from liability for the underlying felony."[7] The conditions under which a non-killer defendant may extricate himself are described in the statute as an affirmative defense. Petitioner's claim, based on the judge's use of the phrase "affirmative defense", therefore, indirectly challenges the constitutionality of the statute by reference to *Mullaney, supra. Mullaney* held that a Maine statute requiring a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the charge to manslaughter was a violation of due process, in that it relieved the prosecution from proving beyond a reasonable doubt an essential element of the crime of murder, *i.e.*, malice.[8]

> The felony murder doctrine had its origin in the common law during an era when nearly all felonies were punishable by death. Because this often resulted in a barbaric application, the doctrine passed through a series of judicial and later legislative restrictions and limitations. However, both at common law and under the New York statute (supra), a felonious homicide is made murder in the first degree by operation of the legal fiction of transferred intent, which thereby characterizes the homicide as committed with malice prepense. It is the malice of the underlying felony that is attributed to the felon. Thus, a felony murder embraces not any killing incidentally coincident with the felony, but only those committed by one of the criminals in the attempted execution of the unlawful end. Although the homicide itself need not be within the common design, the *act* which results in death must be in furtherance of the unlawful purpose.
>
> In other words, in order for a felon to be guilty of the homicide, the act (as in agency) must be "either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose . . . ." If the lethal *act* is in furtherance of their common purpose, the accomplice is guilty even though there was an express agreement not to kill, or even if he actually attempts to prevent the homicide.

People v. Wood, 8 N.Y.2d 48, 51-52, 201 N.Y.S.2d 328, 331-33 (1960) (citations and footnotes omitted). *See United States v. Branic*, 495 F.2d 1066, 1069 (D.C. Cir. 1974); *United States v. Heinlein*, 490 F.2d 725, 735-36 (D.C. Cir. 1973); 1 Wharton, Criminal Law and Procedure §251.

Section 125.25 (3)(a) was intended to alleviate the harsh result that existed under the predecessor statute (§1044(2)),[9] by giving the defendant the opportunity " . . . to fight his way out of a felony murder charge by persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life. . . . "[10] The prosecutor is not relieved of proving any essential element of the crime of felony murder under N.Y. Penal Law §125.25(3) (McKinney 1975). Neither the statute nor the court's charge required the defendant to admit the commission of the underlying felony in order to assert his affirmative defense under the statute. Indeed, he took the witness stand and denied participation in the robbery attempt.

Reading the charge in its entirety, this court is convinced that the jury was fairly advised of the prosecution's burden in proving the guilt of the defendant of the felony murder charge by proof beyond a reasonable doubt, and of the statutory right granting the defendant the opportunity to exculpate himself from the murder by establishing his

affirmative defense by a fair preponderance of the credible evidence.

Petitioner suggests that the mere requirement under the statute that a defendant assert an affirmative defense is violative of the due process clause. The Court in *Mullaney, supra,* made clear that it did not intend to strike the requirement in many statutes that a defendant show some evidence that he acted in the heat of passion "before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt." (421 U.S. at 701 n. 28, 95 S.Ct. at 1891 n. 28).

The court finds N.Y. Penal Law §125.25(3) (McKinney 1975) within the constitutional limits established in *In re Winship* as explicated by *Mullaney,* and that the charge did not violate petitioner's right to due process.

The petition is dismissed, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the respondents and against the petitioner dismissing the petition.

s/Jacob Mishler
U.S.D.J.

FOOTNOTES

1. *United States v. Singleton,* 75 1114 (2d Cir. February 13, 1976).

2. These facts are drawn from Respondents' Affidavit in Opposition at pp. 2-4.

3. The court's charge in pertinent part stated the following:

And the People have the burden of proving the defendant guilty beyond a reasonable doubt except to what we call an affirmative defense, which I will get to you later.

. . . . .

First, the People must prove that a homicide took place. And then comes the question of, what kind of a homicide was it, a murder, was it a manslaughter, and the law provides, gentlemen, that a person is guilty of murder when, acting alone or with one more other person, he commits or attempts to commit robbery, and in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant, if there be any, causes the death of a person other than one of the participants.

. . . . .

The People have the burden of proving the defendant guilty beyond a reasonable doubt except in certain instances, and I read to you the section about a person being guilty of a murder when, acting alone or with one other person he commits or attempts to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom he or another participant, if there be any, causes the death of a person other than one of the participants.

Then, the law goes on to read, except that in any prosecution under this subdivision in which the defendant was not the only participant in the underlined crime, as an affirmative defense, the burden of proving this is on the defendant, that the defendant, one, did not commit the homicidal act or in any way solicit, request, command or im-

portune or aid the commission thereof, and that he was not armed with a deadly weapon or any other instrument, article or substance . . . [a]nd that he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury.

I told you that the burden is on the People to prove the defendant guilty beyond a reasonable doubt, but the defendant has the burden of proving all of those elements of his affirmative defense rests upon the defendant. That means that it must be established by a fair preponderous [sic] of the credible evidence that the claim that the defendant makes is true.

The credible evidence means the testimony or exhibits found to be worthy of being believed. Preponderous [sic] means the greater part of such evidence. This does not mean the greater number of witnesses or greater amount of time taken by either side. The phrase refers to the quality of the evidence. That is, its consisting quality. The weight in effect is for you to determine.

The law requires that, in order for a defendant to prevail, the evidence that supports his affirmative defense must appeal to you as more clearly representing what took place than opposed to his claim. If it does not and the weight is so evenly balanced that you would be unable to say which evidence has the greatest weight on either side, then you must resolve the question in favor of the People, because it is only if the evidence favors the defendant's claim, the evidence opposed to it, that you can find in favor of the affirmative defense for the defendant. You understand the fact that he

has interposed this affirmative defense.

Now, the burden of proving an affirmative defense is, as I say, on him.

The burden of proving that he participated in this crime, that he was acting in concert, is on the People. In other words, if he were there with the intent to commit a crime and participates in it with that intent, then he is guilty, if you are satisfied as to that beyond a reasonable doubt.

On the other hand, if you are satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know one of his fellow was armed—and there is no proof that he, here, himself committed a homicide—no proof that he was armed, but he must prove that he had no reasonable ground to believe that any other participant intended to engage in the conduct. The burden of proving that is on him. That's if you are satisfied beyond a reasonable doubt that he was not a mere spectator, if you are satisfied beyond a reasonable doubt that he was not.

4. In *United States ex rel. Smith v. Montayne,* where the petitioner claimed the charge "was confusing in a variety of ways", the court said, "It should be noted in addition that defendant's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of the points currently before this court." 505 F.2d at 1359.

5. The court asked counsel, "Do you have any exceptions?" Defendant's counsel answered, "I have no exceptions."

6. The text of N.Y. Penal Law §125.25(3) is as follows:

> A person is guilty of murder in the second degree when:

. . . .

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

7 N.Y. Penal Law §125.25 (McKinney 1975), Practice Commentaries by Arnold D. Hechtman.

8. In *In re Winship, supra,* the court held that the prosecution was required to prove the underlying crime in a juvenile delinquency proceeding by proof beyond a reasonable doubt and implicitly held that §744(b) of the New York Family Court Act, which provides that proof of the underlying criminal act may be established by a preponderence of the evidence, is unconstitutional.

Petitioner cites *Stump v. Bennett,* 398 F.2d 111 (8th Cir.) *cert. denied,* 393 U.S. 101, 89 S.Ct. 483 (1968). In *Stump,* the court held that an Iowa statute requiring a defendant to plead and prove his alibi defense was constitutionally impermissible. The court held:

> " . . . when the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, as it was in the instant case, then it is certain that the due process clause of the Fourteenth Amendment has been violated."

398 F.2d at 118.

The holding here is consistent with the holding in *Stump.* The court also said in *Stump:*

> " . . . an affirmative defense generally applies to justification for his admitted participation in the act itself."

398 F.2d at 116.

Though an affirmative defense may be in the nature of a confession and avoidance, it is not necessarily so. In the case at bar the affirmative defense offered by petitioner in no way admitted participation in the underlying felony. It went no further than to admit his fortuitous presence.

9. Section 1044 defined felony murder as:

> The killing of a human being, unless it is excusable or justifiable . . . when committed:
>
> 2. . . . by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise . . . .

The statute did not provide a defense to a non-killer felon, no matter how peripheral his involvement in the felony.

10. N.Y. Penal Law §125.25 (McKinney 1975), Practice Commentaries by Arnold D. Hechtman.

ORDER DATED JUNE 10, 1976

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of June, one thousand nine hundred and seventy-six.

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges

(TITLE)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed for the reasons set forth in Judge Mishler's opinion, dated March 10, 1976, and for the further reason that petitioner's failure to object to the state trial judge's charge on the affirmative defense was apparently a deliberate strategic decision to enable petitioner to have the benefit of jury consideration of the affirmative defense, as well as of his general denial.

s/Henry J. Friendly
s/Wilfred Feinberg
s/Ellsworth A. Van Graafeiland
U.S.C.J.J.

MAJORITY OPINION

(SAME TITLE)

COOKE, J.:

The issue in this case is whether an alleged error in the trial court's charge to the jury, to which no exception was taken, is reviewable in this court on the theory that defendant was deprived of a fair trial.

Defendant was convicted, following a jury trial, of the crimes of murder, attempted robbery in the first degree and attempted grand larceny in the third degree. He admitted that on August 13, 1971 he was present during an attempted robbery of a couple in Lincoln Terrace Park by his two companions, George and Gargo (both of whom were dead at the time of trial). During the course of the attempted robbery, one of the victims, Germaine Philips, was shot by either George or Gargo and subsequently died from the wound. Defendant denied knowing that either of his companions was planning to commit a crime or that they were armed. He also denied any participation in the attempted robbery or larceny.

Alberto Greene, the other victim of the crime, testified that two of his assailants were armed, one with a gun, the other with a knife. The third, admittedly the defendant, was apparently unarmed. However, he testified that this third participant cut off his path of escape in the course of the robbery attempt by stepping towards a wall.

Another witness, Rudolph Mills, testified that earlier that evening, defendant and Gargo left his apartment after one of them said he needed money urgently. Defendant had informed Mills that George had a gun and he admitted to Detective Philip Iannuccilli, to whom he first revealed his

presence at the scene of the crime, that on that fateful night, he and his companions were looking for a prostitute and a pimp "to take them off".

These facts would warrant a jury finding that defendant, acting with the requisite culpable mental state, intentionally aided George and Gargo in the commission of the crime of attempted robbery during which one of the participants, known to him to be armed, caused the death of a victim (Penal Law, §§20.00, 110.00, 160.15, 125.25, subd. (3), pars. [c] and [d]).

The charge to the jury left something to be desired. In at least two places it misstated a fact by informing the jury that defendant had interposed an affirmative defense (Penal Law, §125.25, subd. 3). There was no basis in fact for that statement since defendant had denied all knowledge of and participation in the underlying crimes. At other times, the statement of the applicable law was confusing and misleading. Illustrative of the latter defect is the court's statement: "The People have the burden of proof beyond a reasonable doubt *except in certain instances* * * *" (emphasis supplied)

However, the charge, read as a whole, though inceptly phrased, correctly informed the jury that the burden of proof of guilt beyond a reasonable doubt was upon the People and that, if defendant was found guilty of attempted robbery, the burden of proof of the affirmative defense to felony murder was upon him to establish by a fair preponderance of the evidence.

No request to charge made by defense counsel was rejected by the court and, at the conclusion of the corrective statements requested by counsel, in response to a question by the trial judge, said counsel declared "I have no exceptions."

Except in the instance of an appeal taken directly to the Court of Appeals pursuant to sections 450.70 and 450.80 of the Criminal Procedure Law, applicable to capital cases, the jurisdiction of the Court of Appeals in criminal cases is limited to considering questions of law (CPL 470.35). With respect to a ruling or instruction of a criminal court during a trial or proceeding, a question of law is presented "when a protest thereto was registered by the party claiming error, at the time of such ruling or instruction or at any subsequent time *when the court had an opportunity of effectively changing the same.*" (CPL 470.05, subd. 2 [emphasis supplied]). The failure to object to the charge in this case or to request further clarifications at a time when the error complained of could readily have been corrected preserved no question of law reviewable in this Court (*People v. Reynolds,* 25 N.Y.2d 489; *People v. Schwartzman,* 24 N.Y.2d 241, 251, cert. denied 396 U.S. 846; *People v. Simons,* 22 N.Y. 2d 533, 541, cert. denied 393 U.S. 1107; *People v. Adams,* 21 N.Y.2d 397, 403). We note in this regard that counsel for both sides are not without responsibility in protecting the substantial rights of the parties and that that responsibility extends to calling the attention of the court to errors of law which adversely affect a client *at a time when such errors are correctible.*

Although this Court cannot review the alleged errors in the charge for the reasons indicated, appellant has not been deprived of a forum in which his arguments can be heard. We recognize that the Appellate Division is statutorily empowered to "consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant" (CPL 470.15 subd. 1), even though no protest was registered at the trial (CPL 470.15, subds. (3) and (6), par. [a]; *People v. Cipolla,* 6 NY 2d 922, 923.

See Denzer, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL 470.15, pp. 578-79). It was within the sole discretion of the Appellate Division to consider appellant's claim of errors in the charge (*People v. Kibbe,* 35 N.Y.2d 407, 413-414; see, also, Cohen & Karger, Powers of the New York Court of Appeals, §155). That court, however, unanimously affirmed the judgment.

We are constrained here to affirm the order of the Appellate Division since the alleged errors are not reviewable in this court in the absence of a proper exception or request (CPL 470.05 subd. 2).

Order affirmed.

DISSENTING OPINION

(SAME TITLE)

WACHTLER, J. (dissenting):

I agree with the majority that the court's instructions regarding the People's obligation to establish guilt beyond a reasonable doubt were at least "confusing", "misleading" and "ineptly phrased". I do not agree that the error is not reviewable by this court because defense counsel failed to object or except to the charge. The general rule precluding our court from reviewing an error unless an objection was voiced at trial, does not apply where we are called upon to "review a deprivation of a fundamental constitutional right". (See, e.g., *People v. McLucas*, 15 N.Y.2d 167, 172; *People v. Miles*, 289 N.Y. 360, 363; *People v. Bradner*, 107 N.Y. 1, 5; *Cancemi v. People*, 18 N.Y. 128; see also *Henry v. Mississippi*, 379 U.S. 443.)

Few principles of criminal law are more fundamental than the prosecutor's burden of proving guilt beyond a reasonable doubt. And "[l]est there remain any doubt about the constitutional statute of the reasonable-doubt standard" the Supreme Court has said, "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, 397 U.S. 358, 364).

In this case the error can not be said to be harmless, and the majority, quite appropriately, makes no effort to show that it was. The proof at this trial clearly placed the defendant at the scene, in the company of the two armed robbers. The only issue seriously contested was whether he knowingly assisted them in the commission of the crimes

since his conduct was, at best, ambiguous and as the majority notes, he specifically "denied all knowledge of or participation in the crimes." The trial court confused this with an affirmative defense and in effect charged the jury that although the People had the burden of proving guilt beyond a reasonable doubt, the defendant was required to prove the truth of his denials.

This was fundamental error whether considered in the abstract or in the context of this particular case. I would reverse and grant a new trial.

Order affirmed. Opinion by Cooke, J. All concur except Wachtler, J., who dissents and votes to reverse in an opinion.